BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit was rendered July 10, 1940. Rehearing was denied September 23, 1940. The opinion is reported in 114 F2d (Advance Sheets) 118.

II.

JURISDICTION OF THIS COURT.

1. The jurisdiction of this court is based on Judicial Code Section 240, as amended by the Act of February 13, 1925, 28 U. S. C. A. Section 347. The jurisdiction of the District Court arose through diversity of citizenship.

2. The original date of the judgment sought to be revised is July 10, 1940. A petition for rehearing was filed, by leave of Court, July 29, 1940, (R. 185), and the rehearing was denied September 23, 1940 (R. 186).

3. The questions raised in this court on this record are, in substance, whether or not the Circuit Court of Appeals for the Seventh Circuit should have granted petitioner's motion to dismiss the appeal of respondents Anna E. Tanner et al. or to affirm the decree.

III.

STATEMENT OF THE CASE.

The essential facts of the case necessary to pass upon the merits of this petition are fully stated in the accompany-

ing petition for certiorari, subdivision B, "Summary Statement of Matters Involved," and in the interests of brevity are not repeated here.

IV.

SPECIFICATION OF ERRORS.

Detailed specification of errors is set forth under subdivision C of the accompanying petition, "Reasons Relied on for the Allowance of the Writ," and may be summarized as follows:

1. A conflict exists between the opinion and judgment below and the following decisions in respect of whether or not, in the absence of a bill of exceptions or certificate of evidence, the court is confined to a consideration of the judgment roll and the conformance of the decree with the pleadings, findings of fact and conclusions of law:

United States v. *Archibald McNeil & Sons Co.*, 267 U. S. 302, 307;

Insurance Co. v. *Tweed*, 7 Wall. 44, 51;

United States v. *Galveston-Houston Electric Co.*, (C.C.A. 1), 84 F2d 516;

Barton v. *Automobile Insurance Co.*, (C.C.A. 1), 63 F2d 631;

Fraad Talking Machine Co. v. *Empire Mfg. Co.*, (C.C.A. 2), 250 Fed. 618;

Reilly v. *Beekman*, (C.C.A. 2), 24 F2d 791;

United States v. *Hill*, (C.C.A. 2), 34 F2d 133;

United States v. *Stephanidis*, (C.C.A. 2), 47 F2d 554;

Bisbee Linseed Co. v. *Paragon Paint & Varnish Co.*, (C.C.A. 2), 66 F2d 595;

United States v. *King & Howe, Inc.*, (C.C.A. 2), 78 F2d 693;

Harris et al. v. *United States,* (C.C.A. 4), 70 F2d 897;
Ford v. *Grimmett,* (C.C.A. 5), 275 Fed. 140;
Detroit Trust Co. v. *Woodworth, Collector,* (C.C.A. 6), 110 F2d 829;
P. H. & F. M. Roots Co. v. *United States,* (C.C.A. 7), 17 F2d 337;
Interstate Folding Box Co. v. *Empire Box Corp.,* (C.C.A. 7), 68 F2d 500, certiorari denied, 292 U. S. 657;
Hallenbeck v. *Leimert,* (C.C.A. 7), 72 F2d 480;
Townsend v. *Beatrice Creamery Ass'n.,* (C.C.A. 8), 138 Fed. 381;
Brown Sheet Iron & Steel Co. v. *Maple Leaf Oil & Refining Co.,* (C.C.A. 8), 68 F2d 787;
American National Red Cross v. *Raven Honey Dew Mills,* (C.C.A. 8), 74 F2d 160;
Dalton v. *Hazelet,* (C.C.A. 9), 182 Fed. 561;
Walton v. *Southern Pacific Co.,* (C.C.A. 9), 53 F2d 63;
Yangstze Rapid S. S. Co. v. *Deutsch-Asiatische Bank,* (C.C.A. 9), 59 F2d 8;
Bogan v. *Hynes,* (C.C.A. 9), 65 F2d 524.

2. A conflict exists between the opinion and judgment below and the following decisions in respect of whether or not, the record containing no certificate of evidence, and a hearing having been had in open court during the course of which evidence was taken, it must be presumed that competent evidence was adduced at the trial to support the decree:

Neblett v. *Carpenter,* 305 U. S. 297, 304;
Zimmerman v. *Harding,* 227 U. S. 489, 496;
Murray v. *Louisiana,* 163 U. S. 101, 108;

United States v. *Copper Queen Consolidated Mining Co.*, 185 U. S. 495;
Chase v. *African Methodist Episcopal Church*, (C.C.A. 3), 108 F2d 977;
Prosser v. *Chapman*, (C.C.A. 4), 2 F2d 134;
Speh v. *Bullard*, (C.C.A. 5), 90 F2d 227;
Federal Surety Co. v. *Bentley & Sons Co.*, (C.C.A. 6), 51 F2d 24;
Shipe v. *Consumers Service Co.*, (C.C.A. 7), 29 F2d 321;
Rieke Metal Products Co. v. *Finney*, (C.C.A. 7), 70 F2d 509;
A. C. Motor Freight Lines, Inc. v. *Shingledecker*, (C.C.A. 7), 70 F2d 827;
Oriole Phonograph Co. v. *Kansas City etc. Co.*, (C.C.A. 8), 34 F2d 400;
Pulaski-Lonoke Drainage Dist. et al. v. *Missouri Pacific R. Co.*, (C.C.A. 8), 44 F2d 899;
Pratt v. *Stout*, (C.C.A. 8), 85 F2d 172;
Rickard v. *Thompson*, (C.C.A. 9), 72 F2d 807.

3. A conflict exists between the opinion and judgment below and the following decision in respect of whether or not "it is the duty of the appellant to see that the evidence, if any, is in the record, or by appropriate action to show that no evidence was offered or received.":

Pulaski-Lonoke Drainage Dist. et al. v. *Missouri Pacific R. Co.*, (C.C.A. 8), 44 F2d 899.

4. A conflict exists between the opinion and judgment below and the following decisions in respect of whether or not a reviewing court may examine the trial court's opinion to ascertain the facts or evidence in the absence of a cer-

tificate of evidence in the record:

Texas Ranger etc. Co. v. *Robinson,* (C.C.A. 5), 272 Fed. 453;
Townsend v. *Beatrice Creamery Ass'n.,* (C.C.A. 8), 138 Fed. 381;
Clark v. *Milens,* (C.C.A. 9), 32 F2d 1004;
Rickard v. *Thompson,* (C.C.A. 9), 72 F2d 807.

5. A conflict exists between the opinion and judgment below and the following decision in respect of whether or not the ascertainment of a testator's intention is a question of fact or law, and in respect of whether or not, when the will is before the reviewing court, anything further is necessary for review:

Perry v. *Wiggins,* (C.C.A. 8), 57 F2d 622.

6. The court has decided factual questions against petitioner, successful appellee below, on a "strict record" or "record proper."

7. The court has overlooked a pertinent Illinois statute, and reversed a cause, assuming the law to be precisely contrary to what the statute states it is.

V.

SUMMARY OF ARGUMENT.

I.

The ascertainment of the intention of a testator as expressed in a will is a determination of fact.

Perry v. *Wiggins,* (C.C.A. 8), 57 F2d 622;
Bogan v. *Hynes,* (C.C.A. 9), 65 F2d 524;

II.

In the absence of a certificate of evidence, a reviewing court can consider only questions of law apparent on the face of the pleadings insofar as they directly relate to the court's jurisdiction.

United States v. *Archibald McNeil & Sons Co.,* 267 U. S. 302;
Insurance Co. v. *Tweed,* 7 Wall. 44;
United States v. *Galveston-Houston Electric Co.,* (C.C.A. 1), 84 F2d 516;
Barton v. *Automobile Insurance Co.,* (C.C.A. 1), 63 F2d 631;
Fraad Talking Machine Co. v. *Empire Mfg. Co.,* (C.C.A. 2), 250 Fed. 618;
Reilly v. *Beekman,* (C.C.A. 2), 24 F2d 791;
United States v. *Hill,* (C.C.A. 2), 34 F2d 133;
United States v. *Stephanidis,* (C.C.A. 2), 47 F2d 554;
Bisbee Linseed Co. v. *Paragon Paint & Varnish Co.,* (C.C.A. 2), 66 F2d 595;
United States v. *King & Howe, Inc.,* (C.C.A. 2), 78 F2d 693;

Harris et al. v. *United States,* (C.C.A. 4), 70 F2d 897;
Ford v. *Grimmett,* (C.C.A. 5), 278 Fed. 140;
Detroit Trust Co. v. *Woodworth, Collector,* (C.C.A. 6), 110 F2d 829;
P. H. & F. M. Roots Co. v. *United States,* (C.C.A. 7), 17 F2d 337;
Interstate Folding Box Co. v. *Empire Box Corp.,* (C.C.A. 7), 68 F2d 500, certiorari denied, 292 U. S. 657;
Hallenbeck v. *Leimert,* (C.C.A. 7), 72 F2d 480;
Glick v. *United States,* (C.C.A. 7), 93 F2d 953;
Townsend v. *Beatrice Creamery Ass'n.,* (C.C.A. 8), 138 Fed. 381;
Brown Sheet Iron & Steel Co. v. *Maple Leaf Oil & Refining Co.,* (C.C.A. 8), 68 F2d 787;
American National Red Cross v. *Raven Honey Dew Mills,* (C.C.A. 8), 74 F2d 160;
Dalton v. *Hazelet,* (C.C.A. 9), 182 Fed. 561;
Walton v. *Southern Pacific Co.,* (C.C.A. 9), 53 F2d 63;
Yangstze Rapid S S. Co. v. *Deutsch-Asiatische Bank,* (C.C.A. 9), 59 F2d 8;
Bogan v. *Hynes,* (C.C.A. 9), 65 F2d 524.

III.

In the absence from the record of a certificate of evidence, the reviewing court must presume that there was substantial evidence to sustain the court's decree.

Neblett v. *Carpenter,* 305 U. S. 297, 304;
Zimmerman v. *Harding,* 227 U. S. 489, 496;
Murray v. *Louisiana,* 163 U. S. 101, 108;

United States v. *Copper Queen Consolidated Mining Co.*, 185 U. S. 495;
Chase v. *African Methodist Episcopal Church*, (C.C.A. 3), 108 F2d 977;
Prosser v. *Chapman*, (C.C.A. 4), 2 F2d 134;
Speh v. *Bullard*, (C.C.A. 5), 90 F2d 227;
Federal Surety Co. v. *A. Bentley & Sons Co.*, (C.C.A. 6), 51 F2d 24;
Shipe v. *Consumers Service Co.*, (C.C.A. 7), 29 F2d 321;
Rieke Metal Products Co. v. *Finney*, (C.C.A. 7), 70 F2d 509;
A. C. Motor Freight Lines, Inc. v. *Shingledecker*, (C.C.A. 7), 70 F2d 827;
Oriole Phonograph Co. v. *Kansas City etc. Co.*, (C.C.A. 8), 34 F2d 400;
Pulaski-Lonoke Drainage Dist. et al. v. *Missouri Pacific R. Co.*, (C.C.A. 8), 44 F2d 899;
Pratt v. *Stout*, (C.C.A. 8), 85 F2d 172;
Rickard v. *Thompson*, (C.C.A. 9), 72 F2d 807.

IV.

The burden is upon the appellant to see that the evidence, if any, is in the record, or by appropriate action to show that no evidence was offered or received.

Pulaski-Lonoke Drainage Dist. et al. v. *Missouri Pacific R. Co.*, (C.C.A. 8), 44 F2d 899.

V.

The opinion of the trial court cannot be resorted to for the purpose of determining what the evidence before him was, in the absence from the record of a certificate of evidence.

Saltonstall v. *Birtwell,* 150 U. S. 417;
United States v. *Wells,* 283 U. S. 102;
Texas Ranger etc. Co. v. *Robinson,* (C.C.A. 5), 272 Fed. 453;
Townsend v. *Beatrice Creamery Co.,* (C.C.A. 8), 138 Fed. 381;
Clark v. *Milens,* (C.C.A. 9), 32 F2d 1004;
Rickard v. *Thompson,* (C.C.A. 9), 72 F2d 807;
Blumenfeld v. *Union Nat'l Bank,* (C.C.A. 10) 38 F2d 455;
Martin v. *Drexel Ice Cream Co.,* (C.C.A. 7) 80 F2d 768.

VI.

A decree in equity, if right for any reason, must be affirmed.

Helvering v. *Gowran,* 302 U. S. 238;

VII.

The law of Illinois, as expressed in its statutes, (Ill. Rev. Stat., 1939, Ch. 3, Sec. 200) is that legacies to descendants of the testator do not lapse when the legatee dies before the testator.

ARGUMENT.

I.

The ascertainment of the intention of a testator as expressed in a will, is a determination of fact.

The court below and counsel for the respondents Anna E. Tanner et al. have been proceeding throughout this controversy under the erroneous impression that the ascertainment of the proper claimant to a fund created under a will is the decision of a question of law; that the only requisites of a sufficient record to determine such question are the pleadings, the so-called findings of fact and conclusions of law, and the decree.

The rule is to the contrary, however. The ascertainment of the proper claimant is the decision of a question of ultimate fact; since it is the decision of a question of fact, it cannot be decided upon a "strict record" or "record proper" which permits review of questions of law only.

The rule relied on by petitioner is clearly set forth in two fully considered opinions in the Eighth and Ninth Circuits.

Perry v. *Wiggins*, (C. C. A. 8), 57 F2d 622, was a contest between rival claimants to real estate, devolution of title being under a will. The action was at law and was tried by the court without a jury upon a stipulation of fact including, among other items, the will in question. In holding that there was nothing before the court which it could review, it was said, per Judge Gardner, at page 625,

> "The facts as agreed upon were presented to the court as the evidence in the case. For instance, a copy of the will is set out. This was not an ultimate fact. The ultimate fact was that by will the testator made certain disposition of the property. * * *
>
> "No request for declaration of law having been made, there is nothing presented for examination, ex-

> cept the primary record. * * * As the judgment is sustained by the primary record, no prejudicial error is shown, and the judgment appealed from is therefore affirmed."

In the instant case, the decree is clearly sustained by the primary record. By his complaint (R. 3) petitioner demanded "judgment against (respondent The Northern Trust Company) in the sum of $17,340.34 and an accounting," etc. The court found the ultimate fact (R. 81) "That it was the intention of (the testator) * * * that after the death of (the life tenant) all that part of said fund, if any, remaining should go to (petitioner), * * *" The decree (R. 84-85) was that petitioner "take one-half of the funds in the hands of the (respondent) The Northern Trust Company" subject to costs and the like.

Bogan v. *Hynes,* (C. C. A. 9), 65 F2d 524, was an ejectment action, the ultimate question being ownership under a deed. No bill of exceptions or statement of the evidence was in the record. The court said, at page 525, per Judge Wilbur,

> "The statement of ownership, title, or interest by the court as resting in any individual is a finding of ultimate fact and not a conclusion of law. * * *
>
> "It is immaterial whether the findings of the ultimate fact is in the 'findings of fact' or in the so-called 'conclusions of law', *Lewis* v. *Ingram,* (C. C. A. 10), 57 F2d 463, 466; *Compania Transcontinental etc.* v. *Mex. Gulf Oil Co.,* (C. C. A. ....), 292 F. 846. In the case at bar, the finding as to title is in the conclusions of law and is that the title to the property is vested in the defendants. The finding of this ultimate fact supports the judgment and requires an affirmance of the judgment."

It is also to be observed that the action of the court below, applying its theory (R. 174) "the entire will is before us, and that would seem to be sufficient." conflicts directly

with the action of the Eighth Circuit in *Perry* v. *Wiggins*, 57 F2d 622, in refusing to examine the proceedings irrespective of the fact that the entire will and numerous findings were before it. The conflict is real and should be resolved in favor of one approach or the other.

II.

In the absence of a certificate of evidence, a reviewing court can consider only questions of law apparent on the face of the pleadings insofar as they directly relate to the court's jurisdiction.

Respondents brought to the Court of Appeals only the pleadings, findings of fact and conclusions of law, the opinion of the trial court, and the decree. This type of record is known as a "strict record" or "record proper." On such a record and in view of the issue of fact made up by the pleadings and settled by the decree, a reviewing court can consider only the conformance of the pleadings and decree. The merits of the finding of ultimate fact in the decree are foreclosed by respondents' failure to bring up a certificate of evidence.

Courts have been consistent and unanimous in such ruling. At the risk of repetition, we believe their unanimity can best be portrayed by a series of brief quotations from the cases on which we rely, which are as follows:

United States Supreme Court

United States v. *Archibald McNeil & Sons Co.*, 267 U. S. 302,

"As the record contains no bill of exceptions, upon this direct writ of error we can review only questions of law apparent on the face of the pleadings in so far

as they directly relate to the court's jurisdiction." (page 307, per Mr. Justice McReynolds).

See also, *Insurance Co.* v. *Tweed*, 7 Wall 44, 51, (per Mr. Justice Miller).

First Circuit

United States v. *Galveston-Houston Electric Co.*, 84 F2d 516,

"The evidence on which the master made his findings is not reported, and unless his findings were clearly erroneous as a matter of law, they will not be disturbed by this court." (page 521, per Judge Wilson).

See also, *Barton* v. *Automobile Insurance Co.*, 63 F2d 631, 635, (per Judge Wilson).

Second Circuit

Reilly v. *Beekman*, 24 F2d 791,

"A bill of exceptions was necessary to make the so-called transcript a part of the record, and without one the record is limited to 'the pleadings, the process, the verdict, and the judgment. * * *' *Clune* v. *U. S.*, 159 U. S. 590. In view of the foregoing, the only questions really open for consideration are whether the judgment was justified in view of the pleadings." (page 794, per Judge A. N. Hand).

See also, *Fraad Talking Machine Co.* v. *Empire Mfg. Co.*, 250 Fed. 618, 619 (per Judge Hough); *United States* v. *Hill*, 34 F2d 133, 135 (per Judge A. N. Hand); *United States* v. *Stephanidis*, 47 F2d 554, (per Judge Swan); *Bisbee Linseed Co.* v. *Paragon Paint & Varnish Co.*, 66 F2d 595, 597, (per Judge Chase); *United States* v. *King & Howe, Inc.*, 78 F2d 693, 695 (per Judge Swan).

Fourth Circuit

Harris et al. v. *United States*, 70 F2d 897,

"Where there is no bill of exceptions properly be-

fore the court, the record which we may consider on appeal is limited to the pleadings, process, verdict and judgment." (page 898, per District Judge Wm. C. Coleman).

Fifth Circuit

Ford v. *Grimmett,* 278 Fed. 140,

"The record does not contain a bill of exceptions, agreed statement of facts, or findings of fact. It does contain unauthenticated notes, which purport to contain the evidence submitted at the trial, and also an opinion of the District Judge. We have nothing before us, therefore, except the petition and answer, by which to test the correctness of the judgment." (page 141, per Judge Bryan).

Sixth Circuit

Detroit Trust Co. v. *Woodworth, Collector,* 110 F2d 829,

"No bill of exceptions was filed, and we therefore consider only the sufficiency of the facts found to support the judgment." (page 831, per Judge Allen).

Seventh Circuit

Interstate Folding Box Co. v. *Empire Box Corp.,* 68 F2d 500, certiorari denied 292 U. S. 657,

"For want of a properly prepared and properly certified statement of the evidence, the decree must be affirmed" (page 500, per Judge Evans).

See also, *P. H. & F. M. Roots Co.* v. *United States,* 17 F2d 337, 338 (per Judge Alschuler); *Hollenbeck* v. *Leimert,* 72 F2d 480, (per Judge FitzHenry); *Glick* v. *United States,* 93 F2d 953, 955, (per Judge Evans).

Eighth Circuit

Townsend v. *Beatrice Creamery Association,* 138 Fed. 381,

> "As the decree shows that the cause was heard upon the cross-bill, answer, and reply, and the proofs in the case, the dismissal of the cross-bill was therefore predicated on the proofs for want of equity. The proofs not being before the court, it results that the decree of the circuit court must be affirmed" (page 383, per District Judge Philips).
>
> See also, *Brown Sheet Iron & Steel Co.* v. *Maple Leaf Oil Refining Co.,* 68 F2d 787, 788 (per Judge Gardner); *American National Red Cross* v. *Raven Honey Dew Mills,* 74 F2d 160, 162, (per Judge Woodrough).

Ninth Circuit

Bogan v. *Hynes,* 65 F2d 524,

> "This case was tried without a jury and there is no bill of exceptions or statement of the case in the record. Therefore, the only question involved on this appeal is whether or not the findings support the judgment" (page 525, per Judge Wilbur).
>
> See also, *Dalton* v. *Hazelet,* 182 Fed. 561, 570 (per Judge Ross); *Walton* v. *Southern Pacific Co.,* 53 F2d 63, 69 (per Judge Sawtelle).

The unanimity evidenced in the foregoing citations would continue though they were multiplied many fold. If they correctly reflect the law, the court below should have granted petitioner's motion and dismissed or affirmed the decree. Only where the merits can be ascertained from the pleadings without benefit of evidence, as in *Montgomery* v. *Erie R. R. Co.,* (C.C.A. 3), 97 F2d 289, can the merits be determined upon a "strict record" or "record proper."

III.

In the absence from the record of a certificate of evidence, the reviewing court must presume that there was substantial evidence to sustain the court's decree.

The instant record shows that there was an issue of fact framed by the pleadings, a hearing at which evidence was taken, and a decree for petitioner. The evidence being absent from the record, the reviewing court must presume that sufficient evidence was adduced below to sustain the court's decree. The incongruity of the decision and judgment below can best be observed from a brief series of quotations from leading cases, as follows:

United States Supreme Court

Neblett v. *Carpenter,* 305 U. S. 297,

"The record upon which the appeal was taken to the Supreme Court of the State, and which has been brought here by our writ, contains only the judgment roll. The evidence is not before us and the court below has held that, under the State law, the judge was not bound to make special findings. We must presume that there was substantial evidence to sustain the court's decree" (page 304, per Mr. Justice Roberts).

See also, *Zimmerman* v. *Harding,* 227 U. S. 489, 496 (per Mr. Justice Lurton); *Murray* v. *Louisiana,* 163 U. S. 101, 108 (per Mr. Justice Shiras); *United States* v. *Copper Queen Consolidated Mining Co.,* 185 U. S. 495, 498 (per Mr. Justice Peckham).

Third Circuit

Chase v. *African Methodist Episcopal Church,* 108 F2d 977,

"It results that on this appeal the record, while containing the district court's findings, does not contain

the testimony upon which those findings were based. We must therefore assume that the findings of fact were supported by the evidence which the court had before it" (page 978, per Judge Maris).

Fourth Circuit

Prosser v. *Chapman,* 2 F2d 134,

"Every reasonable doubt, in such circumstances will be resolved in favor of the correctness of the trial court's decision; and this is particularly true where the appellant has seen fit not to bring the testimony taken by the master and considered by the court up as a part of the record here" (page 136, per Judge Waddill).

Fifth Circuit

Speh v. *Bullard,* 90 F2d 227,

"They (appellants) must fail, too, in their attack upon the findings, as without evidence to support them, because of the complete absence from the record of a statement of the evidence. In this condition of the record we may not inquire whether, we must assume that, the findings are adequately supported" (page 228, per Judge Hutcheson).

Sixth Circuit

Federal Surety Co. v. *A. Bentley & Sons Co.,* 51 F2d 24,

"It may be said parenthetically that since the record contains no statement of evidence, either in narrative or any other form, we must assume that all the findings of fact made by the master and approved by the court are sustained by the evidence, and conclusive upon the parties hereto" (page 26, per Judge Simons).

Seventh Circuit

Shipe v. *Consumers Service Co.*, 29 F2d 321,

"For appellant it is contended that the record discloses no evidence whereon to base the finding by the court. The record discloses no evidence at all. There is no certificate of evidence, and in its absence we may not infer that there is no evidentiary basis for the court's finding" (page 322, per Judge Alschuler).

See also, *Rieke Metal Products Co.* v. *Finney*, 70 F2d 509, 512 (per Judge Alschuler); *A. C. Motor Freight Lines, Inc.* v. *Shingledecker*, 70 F2d 827, 828 (per Judge Sparks).

Eighth Circuit

Pulaski-Lonoke Drainage Dist. et al. v. *Missouri Pacific R. Co.*, 44 F2d 899,

"But when the record is silent it will be presumed that evidence was adduced, the burden devolving upon appellant to see that his record affirmatively supports his contentions" (page 901, per Judge Van Valkenburgh).

See also, *Oriole Phonograph Co.* v. *Kansas City Fabric Products Co. et al.*, 34 F2d 400, 401 (per Judge Gardner); *Pratt* v. *Stout*, 85 F2d 172, 176 (per Judge Sanborn).

Ninth Circuit

Rickard v. *Thompson*, 72 F2d 807,

"As appellant has failed to include in the record any of the evidence taken at the trial and the only statement as to evidence is contained in the opinion of the court, which amply sustains the findings and decree, this court must presume that these findings are correct" (page 809, per Judge Garrecht).

If the foregoing quotations correctly reflect the law,

and their unanimity is conclusive on such a question, the court below was bound to find, the evidence not being preserved in the record, that substantial competent evidence was before the trial court to establish the proposition that the respondents Anna E. Tanner et al. "take nothing under, by or through the last will and testament of Sarah De Loss, deceased" (R. 85).

IV.

The burden is upon the appellant to see that the evidence, if any, is in the record, or by appropriate action to show that no evidence was offered or received.

When respondents Anna E. Tanner et al. filed their designation of contents of the record on appeal (R. 109), it was obvious that they did not propose to take up for review any questions of fact which had been passed upon by the trial court, since there is no specification in the designation for the transmission of a certificate of evidence to the reviewing court. The question immediately presented itself to counsel for the petitioner, when the notice of the filing of the designation was served, what questions, under the designation, would be before the Circuit Court of Appeals, and whether it was necessary for the petitioner as an appellee to said appeal to amend and supplement the record by including a certificate of evidence.

Reference to the authorities promptly solved these questions.

As we have indicated, (Section II, *supra*), the authorities are unanimous that, when an appeal is taken on a "strict record" or "record proper," the only question before the reviewing court is the propriety of the decision in view of the pleadings and findings.

A question still to be considered was whether there was any duty upon the petitioner, as a prospective appellee to the appeal, to preserve and transmit the evidence to the Circuit Court of Appeals. This question was answered in the negative by *Pulaski-Lonoke Drainage Dist. et al.* v. *Missouri Pacific R. Co.*, (C.C.A. 8), 44 F2d 899.

That case is clear and can leave no doubt of the proper rule to be followed. In passing upon a similar record, Judge Van Valkenburgh said, at page 901 of the opinion,

> "No evidence is contained in the record brought. Appellant in brief insists that none was taken. Appellee insists that the record sustains the finding and judgment of the trial court. We are remitted to the rule that it is the duty of the appellant to see that the evidence, if any, is in the record, or by appropriate action to show that no evidence was offered or received."

It is obvious, in view of this clear statement of procedure, that whatever deficiencies might exist in the record were the responsibility of the appellants alone; if there were any questions which might have been decided upon a record containing all of the evidence, but which could not be decided because of the absence of the evidence from the record, the party suffering must be the appellants; further, the appellee was entitled to rely upon the proposition, substantiated by numerous cases referred to under subdivision III of this argument, that, if evidence was taken and not preserved, it would be presumed to be adequate to sustain the decree.

The court below has disregarded and contravened all of these rules and decisions in achieving a reversal.

It is for this reason that we urge this court to consider this case upon a full argument and announce authoritatively whether the rule of practice stated by Judge Van Valken-

burgh in the *Pulaski-Lonoke* case is correct; whether a successful appellee may rely upon the proposition that it is the duty of the appellant to see that the evidence, if any, is in the record; whether the successful appellee can rely upon the proposition that, if the appellant brings up nothing but a "strict record," the question of the propriety of the decree in view of the pleadings and findings is the only one before the reviewing court; whether the successful appellee can rely upon the proposition that, upon appeal upon a "strict record" all possible factual questions must be answered in the appellee's favor and that the decree must be plainly wrong upon the law, granting that all possible pertinent facts favor the appellee.

The propositions stated and upon which this petitioner, as appellee, relied, when reviewing the effect of respondents' designation of the record, are so clear that it is incomprehensible that a court could have departed from them and reversed a case as the reviewing court has reversed the instant case. The principal desideratum, in providing for review of decisions of the Circuit Courts of Appeal by certiorari to the Supreme Court, is to make the law upon which the profession and the litigating public must rely as certain as possible. We thought the law was certain, as we have indicated from a review of the authorities upon which we relied. If the court below is right, the numerous decisions squarely in conflict with its procedural approach to the instant case are necessarily wrong.

As matters stand now, an appellee faced, as was petitioner in the instant case, with an appellant's taking up an appeal on a short record, upon examining the authorities will find Judge Van Valkenburgh's statement that, if any evidence was taken, it is the duty of the appellant to bring it up; they will likewise find the statement of the court

below, as preserved in the headnote of the annotator of the West Publishing Co. in the Federal Reporter, under Courts, Sec. 405 (16),

> "An appeal would not be dismissed on the ground that appellants had not incorporated in record transcript of all of testimony, where it was obvious from District Court's memorandum and from motion itself that motion referred to certain testimony which was received subject to appellants' objections, and that afterwards District Court sustained the objections, and no exceptions were saved to such ruling."

We believe the annotater has fairly paraphrased the proposition of law stated in the opinion of the court below.

The question then is, is the Seventh or the Eighth Circuit correct in its approach. While the decision of each Circuit is binding within the Circuit, a petitioner outside either of the Circuits would not possibly know what approach another reviewing court would take in the matter.

It is not enough to say that the safe mode of proceeding is for the appellee to prepare a certificate of evidence and have it included in the record. This adds to the client's expense after the case has been won, preliminarily at least, and it may not be practicable; the evidence may consist of many thousands of pages and the reviewing court may decide, after its inclusion in the record, that taking up the evidence was unnecessary for a decision of the case on a "strict record." In such event the appellee would be burdened with considerable additional expense for improperly including unnecessary matters in the record under rules which prevail in all of the Circuits. Nor is it practicable to go to the Circuit Court of Appeals in each case to decide just how much of the record should be brought up, as was done in the case of *Kelly* v. *Central Hanover Trust Co.*, (C.C.A. 2), 85 F2d 61.

These considerations seem most persuasive of the proposition that this court should grant certiorari in the instant case and settle once and for all, in an authoritative opinion, the respective duties of the appellant and the appellee in making up a record.

V.

The opinion of the trial court cannot be resorted to for the purpose of determining what the evidence before him was, in the absence from the record of a certificate of evidence.

The reviewing court, confronted with petitioner's motion to dismiss, said, in effect, "We are overruling this motion to dismiss because we can see from the trial court's opinion that any evidence omitted was not important."

Contrary to the court's statement (R. 174) that "if was obvious * * * from the motion itself" that petitioner was complaining about the omission of certain testimony, the motion (R. 135) simply points out that evidence was heard and no certificate of evidence was included in the record.

In looking into the trial judge's opinion and drawing therefrom its own conclusions as to the nature of the evidence which it heard, the court departed completely from all precedent.

We do not find any instance in which the Supreme Court has passed upon the propriety of using the trial court's opinion in lieu of a certificate of evidence. The Supreme Court has, however, passed upon attempts to bolster defective findings of fact by references to the trial court's opinion and in each instance has discountenanced such procedure. In *Saltonstall* v. *Birtwell,* 150 U. S. 417, it was said by Mr. Chief Justice Fuller, at page 419,

"We are of opinion that the facts set forth in the special findings are not sufficient to support the judgment. * * * The opinion might help the findings out, but cannot be resorted to for that purpose."

A more recent statement may be found in *United States* v. *Wells,* 283 U. S. 102, where it was stated, at page 120, by Mr. Chief Justice Hughes,

"The only difficulty presented by the record is that this statement with respect to the motive of the decedent appears in the opinion of the court and not in its findings of fact. We are not at liberty to refer to the opinion for additional findings."

Several of the Circuits, however, have been confronted with the argument that they might refer to the trial court's opinion in lieu of a certificate of evidence, where the latter was missing from the record. Their approach to this problem is as follows:

Fifth Circuit

Texas Ranger Producing & Refining Co. v. *Robinson,* 272 Fed. 453,

"We may not properly treat the opinion of the court as findings of fact. It is not incorporated in the bill of exceptions and has no place there. It is required to be printed in the record merely for our information as to the views of the trial court. It is not a substitute for and cannot take the place of a bill of exceptions." (page 455, per Judge Bryan).

Eighth Circuit

Townsend v. *Beatrice Creamery Association,* 138 Fed. 381,

"There is not one word of evidence preserved in this record. Counsel seem to have assumed that the

memorandum opinion filed by the trial judge during the pendency of the case, which is sent up with the record, can be referred to on this appeal for the ascertainment of the essential facts in evidence. This is a fatal misconception. Recourse cannot be had to such opinion to ascertain the facts." (page 382, per Philips, District Judge).

See also, *Ogden City* v. *Weaver,* 108 F. 564, 566 (per Judge Thayer); *Keeley* v. *Ophir Hill Consolidated Mining Co.,* 169 Fed. 598, 600 (per Judge Adams); *Nowata County Gas Co.* v. *Henry Oil Co.,* 269 Fed. 742, 744 (per Johnson, District Judge).

Ninth Circuit

Rickard v. *Thompson,* 72 F2d 807,

"As heretofore stated, the evidence as adduced on the trial is not in the record. Appellant relies for support of her contention by reference to matters appearing in the opinion of the court below, but the rule is well settled that on appeal recourse cannot be had to an opinion rendered by the court below to ascertain the facts, where there is no evidence in the record and where the case was decided on issues of fact." page 810, per Judge Garrecht).

See also, *Meyer* v. *Everett Pulp & Paper Co.,* 193 Fed. 857, 863 (per Judge Wolverton); *Northern Idaho & Montana Power Co.* v. *Jordan,* 262 Fed. 765, 766 (per Judge Gilbert); *Clark* v. *Milens,* 32 F2d 1004, 1005 (per Judge Rudkin).

Tenth Circuit

Blumenfeld v. *Union National Bank,* 38 F2d 455,

"There is an intimation in the opinion of the court below that at the hearing, in the answer to an inquiry, the receiver stated the fund in question was deposited in the Kansas City bank. But the fact does not appear in the evidence brought to this court and is not entitled to consideration." page 457, (per Judge Cotteral).

The only mention of the subject in the decisions of the Seventh Circuit which we have found is in *Martin* v. *Drexel Ice Cream Co.*, 80 F2d 768, where Judge Alschuler says, at page 770,

> "The court's opinion, or memorandum of opinion, is not a finding of fact or conclusion of law."

In such holding, the court was consonant with all of the applicable decisions and set a principle which was disregarded by the court below.

The court below has gone far beyond the lengths forbidden in the cases quoted from and referred to *supra*. To bolster a "strict record" lacking a certificate of evidence, the nature of certain evidence being pertinent to its inquery, it has examined the trial court's opinion, based a conclusion upon a conclusion, and adjudged that the evidence under consideration was impertinent to the question involved. This is a new tack in the jurisprudence of review. We believe it a decidedly dangerous method of settling the merits of a controversy. If the evidence was pertinent, as it plainly was, and not in the record, which must be conceded, the court must have affirmed under principles set out in subdivisions II to IV above.

VI.

A decree in equity, if right for any reason, must be affirmed.

The foregoing principle has been completely forgotten by the court below. It is well established in the jurisprudence, a recent succinct statement being that of Mr. Justice Brandeis in the case of *Helvering* v. *Gowran*, 302 U. S. 238, at page 245,

> "In the revision of judicial proceedings, the rule is settled that, if the decision below is correct, it must be

affirmed, although the lower court relied upon a wrong ground or gave a wrong reason'' (Citing many cases).

On the present record, there is no authoritative means of settling the question of whether or not the decree of the lower court was correct. This question can be determined only when the evidence offered at the hearing is preserved for review. Because of the absence of such evidence from this record, the precise determination of the controversy has become impossible, the parties at fault, if any there be, are the respondents Anna E. Tanner et al., and a decision which permits them the advantage of their fault certainly disregards the usage and custom of orderly judicial procedure.

Some of the facts being unknown, it is obviously possible that under some theory or other the decree of the trial court could well have been right and, as we have indicated, the principle announced by Mr. Justice Brandeis above then becomes applicable. The decree then must be affirmed.

Disregard of this principle affords yet another reason why certiorari should be granted in this case.

VII.

The law of Illinois, as expressed in its statutes, (Ill. Rev. Stat., 1939, Ch. 3, Sec. 200) is that legacies to descendants of the testator do not lapse when the legatee dies before the testator.

The court below has stated in its opinion that the law of Illinois is exactly the opposite of what the Illinois Statutes specify the law to be.

The point around which this misstatement of the law revolves is crucial in an interpretation of the will under the court's theory that deciding what a testator intends is purely a matter of law. A development of the details of the

matter would require extensive discussion, but the misapprehension of the court may be pointed out briefly. The opinion (R. 173, last three lines) states,

> "* * * for upon the death of either (son), before the mother's death, the devise would lapse and become a part of her personal estate."

The devise to a son would not lapse, if such son did not survive his mother, but under the provisions of Section 200, Chapter 3 of the Illinois Revised Statutes, 1939, the son's issue, if any, as there were in this case, would take the estate devised under the will and there would be no lapse.

The point being crucial, petitioner is irreparably harmed when the court assumes the law to be contrary to what a statute says it is. The pronouncement, of course, is impossible as a precedent. It is nevertheless in the books to mislead and confuse. Certiorari is eminently appropriate in such situations to correct the error.

Due process on a hearing requires, at the very least, that well-known statutes called to the attention of a court shall be applied to admitted facts in accordance with their plain language. It is more than a mere erroneous decision of which petitioner seeks review.

CONCLUSION

For the foregoing reasons, petitioner respectfully urges that the writ of certiorari be granted herein in accordance with the prayer of his petition.

All of which is most respectfully submitted.

CARL V. WISNER,
CARL V. WISNER, JR.,
Solicitors for Petitioner.

EARNEST A. SKINNER,
Of Counsel.